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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MOLINA, JR.,

Defendant and Appellant.

F074033

(Kern Super. Ct. No. BF159213A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael Dellostritto, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

One night, defendant and his wife were at a gathering of people at a relative's home. Several gang members were present, including Adrian Garner. Defendant got into a confrontation with his brother-in-law, Arcadio Martinez, and another person. This led several people to physically remove defendant from the home.

Defendant's wife subsequently got into a physical altercation with people at the home and was also physically removed. She was subsequently heard saying the following on a cell phone call outside the home: "You better hurry up, these mother f[\*\*]kers think they are going to laugh at us." While still on the phone, she also made a comment "toward" the home, saying, "We are going to come back and shoot all you mother f[\*\*]kers."

Sometime later, defendant returned to the home with a gun. During a scuffle between defendant and Garner, defendant's gun discharged, killing Garner.

Defendant challenges his resultant conviction for second degree murder on the grounds that (1) the prosecution did not prove malice beyond a reasonable doubt and (2) the trial court improperly admitted the evidence of his wife's comments on the cell phone call in violation of the hearsay rule. We reject both contentions and affirm the judgment.

## **BACKGROUND INFORMATION**

In an information filed July 29, 2015, the Kern County District Attorney charged defendant with first degree murder (count 1; Pen. Code, §§ 187, subd. (a) & 189);<sup>1</sup> and destruction or concealment of evidence (count 2; § 135.) The information also alleged that during the commission of the murder, defendant personally discharged a firearm causing death to another person. (§ 12022.53, subd. (d).)

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<sup>1</sup> Subsequent statutory references are to the Penal Code unless otherwise noted.

A jury acquitted defendant of first degree murder and found the firearm enhancement not true. The jury convicted defendant of the lesser-included offense of second degree murder and destroying evidence.

The court sentenced defendant to 15 years to life on count 1, and a concurrent term of 180 days on count 2.

## **FACTS**

### *Background*

The incident underlying this case involved several people, many of whom are related and share a last name. We begin by setting forth the relationships and living arrangements of the people involved. We will use first and/or last names as clarity dictates throughout this opinion.

In February 2015, Alexis Espinoza lived at a home on Fifth Street in Delano (the “Espinoza residence”). The following people also lived at the Espinoza residence: Alexis’s mother; Alexis’s sister Samantha Espinoza and her boyfriend Jesse Sandoval; Alexis’s other sister Sabrina Espinoza and her boyfriend Adrian Garner; and several children.

At the same time, in February 2015, defendant lived at a home on 19th Avenue in Delano (the “Martinez residence”). The following people also lived at the Martinez residence: defendant’s wife Sabrina Martinez (who was also Alexis’s aunt); defendant’s mother-in-law Francis Martinez; defendant’s brother-in-law Arcadio Martinez<sup>2</sup> and his children.

One of Arcadio’s children was named Angel Martinez. Angel Martinez had a friend, also named Angel. Several witnesses and the parties on appeal refer to Angel Martinez as “Cousin Angel” and to his friend as “Friend Angel.” We will do the same.

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<sup>2</sup> According to Alexis, Arcadio “would stay” at the Martinez residence but “wasn’t officially living there.”

Witnesses testified that Arcadio, Cousin Angel, Friend Angel, and Garner were gang members.

*Percipient Witnesses' Version of Events*

On the evening of February 14, 2015, several people gathered at the Espinoza residence.<sup>3</sup> Defendant and his wife Sabrina Martinez arrived between 8:00 and 9:00 p.m.

At one point in the evening, defendant began “ranting” about how younger gangsters “aren’t really gangsters.” Defendant said younger gangsters are “kind of fake,” “don’t have any respect, and they “do stuff under peer pressure.”

Later that evening, while still at the Espinoza residence, defendant confronted Friend Angel about his tattoo with four dots under his eye. Friend Angel “got upset” and said something that defendant did not like. An altercation began, involving defendant, Friend Angel and Arcadio. One witness said the altercation involved “shoving” or “pushing,” while another said the “altercation” was “[j]ust arguing.” The witness who described “shoving,” said that defendant and Arcadio were going “back and forth” shoving each other. Then, Friend Angel “hopped in,” which resulted in “[m]ore pushing.”

Alexis Espinoza and Sabrina Martinez broke up the fight. Several people then forcefully removed defendant from the house. As he was pushed out the front door, defendant said to Arcadio, “You stupid mother f[\*\*]ker. I’m going to get you. Just wait and see. I’m going to get you.” Another witness heard defendant say he would come back and hurt people in the house. Specifically, he said, “I will be back; so you guys watch out.”<sup>4</sup>

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<sup>3</sup> Espinoza rejected the term “party,” in favor of the following description: “What it was was a few of my friends had came over and a few of my family members had come over after they had did their Valentine’s Day things with their significant others, since my birthday was the day before.”

<sup>4</sup> The witness apparently did not tell responding Detective Scott about this comment at the scene or in an interview days later.

Sabrina Martinez told defendant they were going to talk about his behavior after they got home. They then left together. Later, Sabrina Martinez returned without defendant. She tried to get Arcadio to come outside of the house, claiming she was “trying to make peace.” However, Samantha wondered “why couldn’t they talk to him inside the house,” if all they really wanted to do was talk. Sabrina Martinez eventually said, “Just face him, you scared mother f[\*\*]ker. Be a man and face him.”

Sabrina Martinez and Samantha began arguing. Sabrina Martinez yelled at Samantha Espinoza “telling her to mind her own F[’]ing business and just calling her like a bitch and a whore and other stuff.” Alexis shoved Sabrina Martinez, who responded by “sock[ing]” her in the nose. As Alexis tended to her nose, Sabrina Martinez and Samantha started to physically fight one another.

Sabrina said, “He’s pissed and he’s going to come back with this and f[\*\*]k all you guys.”<sup>5</sup> Sabrina Martinez was “ejected” from the house and began pacing on the sidewalk in front of the house. Around the same time, Garner, Sandra Ortiz (Garner’s sister), and Humberto Ortiz (Sandra’s husband) arrived at the residence. Garner was a Norteño gang member.

A witness saw Sabrina Martinez on a cell phone, and heard her say, “You better hurry up, these mother f[\*\*]kers think they are going to laugh at us.” While still on the phone, Sabrina Martinez also made a comment “toward” the Espinoza residence saying, “We are going to come back and shoot all you mother f[\*\*]kers.”<sup>6</sup>

Samantha received a call from Anthony Martinez – who lived with defendant – saying defendant “came for the gun, and he’s on his way back.” According to Alexis, the Espinoza and Martinez residences are “[l]ike a ten-minute car ride” apart.

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<sup>5</sup> The witness who testified to hearing the statement never told officers about it.

<sup>6</sup> When Officer Ruben Campos interviewed Sandra Ortiz shortly after the incident, she did not mention any threats made by Sabrina Martinez at the residence or on her cell phone.

Samantha informed the other people at the Espinoza residence, who were trying to lock up the house. Samantha heard Sandoval tell Garner, “I have you,” or “I got your back.” Garner responded, “No, carnal, let me handle it.”<sup>7</sup> The two then “bump[ed] heads.”

Garner opened the front door, and defendant was standing there. Defendant said, “What are you looking for, bro? Are you looking for this?” and pulled out a gun. Garner did not have a gun in his hand at the time, but one was later found in his waistband. Defendant tried to walk in with the gun, but Garner tried to push him out. The “back and forth” lasted less than a minute before the gun defendant was holding discharged. Garner looked shocked, his knees buckled, and he fell. Defendant ran away and got into his car. As defendant drove away, someone fired several shots at his car.

Sometime later, a group of more than five Norteños came to the Espinoza residence.

Several nurses initially approached the area to render assistance. One of the nurses saw three or four men jumping and hollering in the driveway. It appeared the men had guns in their waistbands.

Several of the nurses turned back, and only one nurse continued to approach the scene in order to render aid to Garner. There was a shotgun next to Garner’s body, which she had to move to render aid. She also saw that Garner had a gun “in his pants.” A responding officer testified the gun found in Garner’s waistband was positioned so that it would not have been visible unless Garner lifted his shirt.

Garner died, with a bullet having pierced his heart.

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<sup>7</sup> According to Sandoval, “carnal” means “brother.”

### *Toxicologist*

A toxicologist testified that Garner's blood-alcohol concentration was 0.038 percent, and that the levels of Delta 9-THC in his blood indicated Garner was under the effect of marijuana.

Other results indicated Garner had used cocaine sometime within the past few days. The toxicologist could not say whether Garner was "feeling the effects" of cocaine at the time of his death.

### *Sabrina Martinez's Version of Events*

Defendant's wife, Sabrina Martinez, testified. She testified that Arcadio had previously "[s]traight up" told her he was a "Northerner" gang member. One night – before the incident at issue here – Arcadio told defendant he was on a "list of Norteños." Arcadio was going to get him off the list so that the Norteños "wouldn't hurt him or beat him up."

### *Night of the Incident*

On the night of the incident, Sabrina Martinez said defendant accompanied her to the Espinoza residence around 10:00 p.m. While in the living room of the residence, defendant got into an argument with Arcadio. Defendant told Arcadio he should be a better father and a better son.

Later, defendant became involved in another argument away from the living room. Sabrina Martinez was "sure" defendant was arguing with Arcadio and assumed the argument had been taking place in the backyard. Sabrina Martinez did not hear what was said during this argument. The argument caused several people to "throw[]" defendant out of the house. Sabrina Martinez decided to leave with defendant. She did not hear defendant say anything as they were leaving.

Sabrina Martinez and defendant drove around the block in their car. Sabrina Martinez told defendant they needed to talk to Arcadio to "clear the air." They then returned to the Espinoza residence.

Sabrina Martinez got out of the car, while defendant remained in the vehicle. She tried to get Arcadio to come outside so they could “clear the air.” Arcadio refused to come outside. Alexis then approached Sabrina Martinez, and “got into her face.” Sabrina Martinez then hit Alexis in the nose. Sabrina Martinez then felt something hit her in the head, and she could not see for a moment. During this time, Sabrina Martinez was yelling indecipherably.

A group of people tried to “force” Sabrina Martinez “out.” When she reached the front gate of the house, defendant and the car were no longer there. She had left her phone in the car, so she walked to her mother-in-law’s house.

Sabrina Martinez admitted she was drunk while at the Espinoza residence.

#### *Defendant’s Version of Events*

Defendant testified.<sup>8</sup> Defendant associated with Northerner gang members in his neighborhood when he was a teenager. Before he turned 20, he “left that stuff alone” and “never looked back.”

Arcadio told defendant he was a Northerner. Arcadio asked defendant if he was “good,” meaning to ask whether defendant was an active gang member. Defendant said, “No, Brother.” Arcadio said he would talk to people “high up in the gang” to get defendant removed from the gang’s “no-good list.” Arcadio said that if defendant was not removed from the list, he would be killed.

On the night of February 14, 2015, defendant was conversing in the backyard when he saw Arcadio, Cousin Angel and Friend Angel come in through the front door. Arcadio came straight to the backyard and said to defendant, “What’s up now?” Arcadio told defendant he was “a no good piece of shit.” Defendant said Arcadio needed to take care of his family and stop his gang banging “dumb shit.” Then, Friend Angel “g[o]t in

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<sup>8</sup> Defendant began his testimony by admitting he stole electronics from Sears 12 years prior.



[defendant's] face" and told defendant to keep the Westside out of his mouth. Defendant noticed some "dudes standing up, getting off the couch" who looked "like they were ready to jump in, too."

Arcadio and Friend Angel started pushing defendant out of the house. Defendant told Arcadio he was going to "whip his ass" when he came home. Defendant "mentioned nothing about no firearms." Defendant never said he would come back and shoot anyone at the house.

Sabrina Martinez escorted defendant to the car. The two talked about how they need to "fix" the situation with Arcadio because they lived together. Sabrina Martinez got out of the car to apologize to the people at the Espinoza residence. She told defendant to stay in the car.

Sabrina Martinez went inside the Espinoza residence and the door closed behind her. Two or three seconds after she went inside, defendant heard her scream through an open window. Defendant feared for his wife. Defendant "floored it" in his car and drove to the Martinez residence. Defendant ran through every stop sign and stoplight he came across. When he got to his house, he went into his room and retrieved a .40-caliber handgun. Defendant then drove back to the Espinoza residence.

Defendant got out of his car, but left the engine running. He planned to get his wife and "get the hell out of there." Defendant approached the home from outside, and said, "Where's my wife at?" One of his nieces said, "She ain't here." Defendant took that as his "cue" to "get out of town."

Defendant had his pistol in his right hand, pointing it down. He turned away to leave, when Garner grabbed defendant's gun by the barrel. The two "struggle[d] for control" of the gun. During the struggle, the gun then "went off." Defendant was "in shock that it went off." Garner had a "look of shock on his face." Defendant did not know the bullet had struck Garner.

Jesse Sandoval began to pursue defendant. Defendant pushed him away and started running. Defendant got into his car, but Sandoval prevented him from putting the car into drive. As the two struggled, defendant heard gunshots. Sandoval was “stunned because of the loudness” of the gunshots, enabling defendant to put the car into drive, causing Sandoval to fall out of the car.

Defendant drove away, and eventually dismantled his gun and threw out the barrel, clip and “the pen that holds the gun together.” Defendant learned Garner died and turned himself in the next morning.

## **DISCUSSION**

### **I. Substantial Evidence of Malice was Adduced at Trial**

Defendant argues there was insufficient evidence of malice to sustain his conviction for second-degree murder.

#### **A. Law**

“ ‘Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.]” (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) Manslaughter is an unlawful killing *without* malice. (*Ibid.*)

One who kills with “ ‘the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury – is guilty only of manslaughter.’ [Citation.]” (*People v. Trujeque* (2015) 61 Cal.4th 227, 270.) This is called “imperfect defense of others.” However, it “is not a true defense, but a shorthand description for a form of voluntary manslaughter. [Citations.]” (*Id.* at p. 271.)

If the issue of imperfect self-defense is properly presented in a murder case, the prosecution must prove the absence of imperfect self-defense beyond a reasonable doubt. (*People v. Rios* (2000) 23 Cal.4th 450, 462.) The parties agree the same rule applies to imperfect defense of others.

Defendant argues the prosecution failed to prove he did *not* kill with the actual belief he needed to defend himself or his wife.

“ ‘In reviewing a challenge to the sufficiency of the evidence..., we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Ramirez* (2006) 39 Cal.4th 398, 464.) We “ ‘presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*Ibid.*)

### ***B. Application***

We conclude there was substantial evidence from which a reasonable jury could have found that defendant did not kill because of an actual belief in the need to defend himself or his wife.

#### **1. Substantial Evidence of Malice**

There was evidence that after allegedly hearing his wife scream in the Espinoza residence, defendant *left* the property, got into his car, drove to his home, retrieved a gun, and drove back to where he had heard his wife scream. Because of its inherent implausibility, the jury was free to discredit defendant’s testimony about *why* he left to retrieve his gun. As a result, the jury was free to infer that defendant actually left to retrieve the gun because he was angry with Arcadio, Friend Angel and possibly others at the Espinoza residence.

Other evidence bolsters the inference that defendant sought to kill people at the Espinoza residence out of revenge, anger and/or embarrassment rather than to defend himself or his wife. Defendant was physically removed from the Espinoza residence after fighting with Arcadio. As he was pushed out the front door, defendant said to Arcadio, “You stupid mother f[\*\*]ker. I’m going to get you. Just wait and see. I’m going to get you.” Another witness heard defendant say he would come back and hurt

people in the house. Specifically, he said, “I will be back; so you guys watch out.” These statements raise an inference defendant subsequently acted out of anger, not fear.

Defendant’s wife, Sabrina Martinez, was also removed from the property after getting into a fight. A witness saw her talking on a cell phone, and heard her say, “You better hurry up, these mother f[\*\*]kers think they are going to laugh at us.” While still on the phone, Sabrina Martinez made a comment “toward” the Espinoza residence, saying, “We are going to come back and shoot all you mother f[\*\*]kers.”<sup>9</sup> One reasonable inference from this evidence is that Sabrina Martinez was talking to defendant on the phone, and that they discussed shooting people at the Espinoza residence because they were angry that people thought they could laugh at defendant and his wife. That inference supports the jury’s conclusion that defendant harbored malice when he shot Garner.

## **2. Defendant’s Arguments to the Contrary are Unavailing**

Defendant contends that it would have been reasonable for him to be in fear considering that he knew his wife was in a house with known gang members at least some of whom were hostile; and he knew that gang members can violently escalate situations. Defendant also observes that he did not immediately begin shooting when he arrived back at the Espinoza residence; that events after the shooting confirmed the reasonableness of his fear that gun violence could erupt; and that fleeing the scene and discarding parts of the gun could be explained by “shock” and his desire to escape the people chasing him. At best, defendant’s arguments suggest some of the circumstances of that night could *also* be consistent with imperfect self-defense or imperfect defense of others. Such a contention fails under our substantial evidence standard of review. “ ‘If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment

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<sup>9</sup> When Officer Campos interviewed Sandra Ortiz shortly after the incident, she did not mention any threats made by Sabrina Martinez at the residence or on her cell phone.

is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.]” (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.)

## **II. The Court did not Err in Admitting Evidence of Out-of-Court Statements Made by Sabrina Martinez**

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) As this definition makes clear, “ ‘[t]he hearsay rule excludes evidence of a declarant’s statement only when it is offered to prove the truth of the matter stated in such statement. If a declarant’s statement is offered for some purpose *other than* to prove the truth of the facts stated it is *not* a hearsay statement.’ ” (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1131, abrogated on other grounds by *People v. Brown* (1994) 8 Cal.4th 746.)

### **A. Evidence of Sabrina Martinez’s Statement About People Laughing at “Us” was not Hearsay**

Sandra Ortiz testified that she heard Sabrina Martinez say to someone on the phone: “You better hurry up, these mother f[\*\*]kers think they are going to laugh at us.” This statement was not being offered for its truth – i.e., to show that people at the Espinoza residence actually were laughing at defendant and his wife. Rather, it was offered to support the inference that defendant returned to the home with a gun because he was angry at the people who were there. Because Sabrina Martinez’s statement on the phone was not offered to prove the truth of the matters she stated, but instead to “explain defendant’s state of mind, motive, and conduct” (*People v. Mendoza* (2007) 42 Cal.4th 686, 697), it was admissible.

Defendant argues when an out-of-court statement is offered for a nonhearsay purpose, that purpose must be “relevant” to an issue in dispute. And, to establish relevancy here, the prosecution needed to establish that Sabrina was on the phone with

defendant at the time. However, no one directly identified who Sabrina Martinez was speaking to on the phone when she made the statement.

It is true that out-of-court statements offered for a nonhearsay purpose must still be “relevant” to be admissible. But evidence is relevant even if it only raises an *inference* that a particular fact is true. (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 307.) Evidence may still be relevant even if it does not confirm or “conclusively prove[]” anything. (*Ibid.*) Here, there was no direct evidence that Sabrina was talking to defendant on the phone at the time. However, circumstantial evidence raised the inference she was speaking to defendant.

First, Sabrina referenced people laughing at “us” – meaning herself and whoever she was speaking to. Both defendant and his wife had been recently forced out by people at the Espinoza residence. As a result, both were likely targets of derision by the people at the home. Thus, Sabrina’s belief that the people were laughing at her and the listener, is consistent with defendant being the listener.

Second, Sabrina said the listener should “hurry up” – suggesting the person was planning to return or was being encouraged to return by Sabrina. There was evidence defendant had left prior to the phone call in question and returned after. This chronology is consistent with defendant being the person Sabrina told to “hurry up.”

These factors raise a very plausible inference that Sabrina was speaking with defendant on the phone at the time. The fact that the listener’s identity was not “conclusively prove[n]” (*People v. Dellinger, supra*, 163 Cal.App.3d at p. 307), does not render the evidence inadmissible.<sup>10</sup>

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<sup>10</sup> In his reply brief, defendant argues the trial court did not instruct the jury that the statement was not offered for its truth. We decline to consider that contention. (See *E.J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1131.)

***B. Evidence of Sabrina Martinez’s Statement that “We” are Going to Shoot People was not Hearsay***

Sandra also testified that, while still on the phone, Sabrina Martinez made a comment “toward” the Espinoza residence, saying, “We are going to come back and shoot all you mother f[\*\*]kers.”<sup>11</sup>

Again, this statement is not hearsay because it was “ ‘offered for some purpose other than to prove the truth of the facts stated ....’ ” (*In re Cheryl H.*, *supra*, 153 Cal.App.3d at p. 1131.) Rather, the evidence was offered to “explain defendant’s state of mind, motive, and conduct” (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 697). Specifically, it raised an inference that Sabrina and defendant had been talking about shooting at people, which led Sabrina to make the statement in question. Or, the jury could have inferred that Sabrina’s statement impacted defendant’s state of mind, motive and subsequent conduct. Either way, the out-of-court statement was offered to “explain defendant’s state of mind, motive and conduct” (*ibid.*) and was therefore admissible.

**DISPOSITION**

The judgment is affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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PEÑA, J.

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DESANTOS, J.

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<sup>11</sup> The Attorney General argues defendant failed to preserve a hearsay objection to this statement. Because we conclude defendant’s claim lacks merit, we need not address whether it was properly preserved.